Supreme Court, U.S.
FILED
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No.

In The
Supreme Court of the United States

ZAKE KOLJCEVIC,
Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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January, 2006

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Sixth Circuit and Board of Immigration Appeals erred as a matter of law and deprived an asylum applicant of due process by refusing to reopen her removal proceedings after the Board of Immigration Appeals summarily dismissed her direct appeal solely because her attorney filed her notice of appeal one day late.

2. Whether an alien's right to petition for asylum includes the right to have administrative appellate review over the denial of her application.

3. Whether the Court should resolve a split among the circuit courts of appeals regarding the presumption that an alien is prejudiced when her attorney's ineffective assistance results in the summary dismissal of her appeal.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Zake Koljcevic respectfully prays that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Sixth Circuit entered in this case on May 18, 2005 and October 12, 2005, respectively.

OPINIONS BELOW

The opinion of the Immigration Judge (App. E hereto) is unreported. The opinions of the Board of Immigration Appeals (App. C and D) are unreported. The opinion of the Sixth Circuit Court of Appeals on the merits (App. B hereto), of which review is sought, is unreported. The order of the Sixth Circuit denying the petition for panel rehearing and suggestion for rehearing en banc in such case (App. A hereto) is unreported.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit (App. B) was entered on May 18, 2005. The court denied Petitioner's timely petition for rehearing on October 12, 2005 (App. A). The jurisdiction of the Supreme Court is invoked under Supreme Court Rule 10(a), in that the

Sixth Circuit has entered a decision in conflict with decisions of other United States courts of appeal on the same important matter and has sanctioned a decision of the Board of Immigration Appeals that has so far departed from the accepted and usual course of proceedings, as to call for an exercise of this Court's supervisory power.

RELEVANT PROVISIONS INVOLVED

8 C.F.R. § 1003.1(d)(2) provides, in relevant part:

> (i) Standards. A single Board member or panel may summarily dismiss any appeal or portion of any appeal in any case in which:
>
> ...
>
> (G) The appeal is untimely, or barred by an affirmative waiver of the right of appeal that is clear on the record; ...
>
> (iii) Disciplinary consequences. The filing by an attorney ... of an appeal that is summarily dismissed under paragraph (d)(2)(i) of this section may constitute frivolous behavior under § 1003.102(j). Summary dismissal of an appeal under paragraph (d)(2)(i) of this section does not limit the other grounds and procedures for disciplinary action against attorneys or representatives.

8 U.S.C. § 1158(a)(1) provides:

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.

8 U.S.C. § 1182(a)(9)(B)(iii)(II) provides:

No period of time in which an alien has a bona fide application for asylum pending under section 1158 of this title shall be taken into account in determining the period of unlawful presence in the United States under clause (i) unless the alien during such period was employed without authorization in the United States.

8 U.S.C. § 1231(b)(3)(A) provides:

Notwithstanding paragraphs (1) and (2), the Attorney General may not remove an alien to a country if the Attorney General decides that the alien's life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1252 provides, in relevant part:

(a)(2)(B) Denials of discretionary relief: Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review ...

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

...

(b)(4)(D) The Attorney General's discretionary judgment whether to grant relief under section 1158(a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

STATEMENT

(i) Nature of the Case

This is a petition for review of the decisions of the Board of Immigration Appeals ("BIA"), and the Sixth Circuit Court of Appeals concluding that an asylum applicant was not prejudiced by her attorney's filing of her notice of appeal to the BIA one day late, resulting in the summary dismissal of her appeal and depriving her of administrative appellate review of her asylum application. The Immigration and Nationality Act, implementing regulations, international human rights law, and longstanding federal and agency precedent steadfastly protect the right of asylum applicants to have their claims heard.

(ii) Proceedings at the Immigration Court

Ms. Zake Koljcevic, a 30-year-old native and citizen of Serbia and Montenegro, applied for admission to the United States on November 4, 2000. The Immigration and Naturalization Service ("INS")[1] denied her application for

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[1] The Homeland Security Act abolished the INS effective March 1, 2003 and transferred its functions to various agencies within the Department of Homeland Security. Pub. L. No. 107-296, 116 Stat. 2135, 2192. The BIA and the Immigration Court remain part of the Department of Justice. This petition refers to the INS with respect to actions it took during its existence and to the appropriate agencies for events occurring after March 1, 2003.

admission and paroled her into the United States to pursue her asylum claim. On March 19, 2002, she filed her application for asylum and withholding of removal with the Immigration Court.

Sitting in Detroit, Michigan, the Immigration Judge ("IJ") denied her applications and ordered her removed to Serbia and Montenegro. App. E.

(iii) Proceedings at the Board of Immigration Appeals

Ms. Koljcevic's attorney filed her notice of appeal one day after the September 18, 2002 deadline. The Department of Homeland Security ("DHS") did not raise the timeliness of her appeal and instead briefed the case on the merits. On October 24, 2003, the BIA summarily dismissed her appeal because it was not timely filed. App. D.

Ms. Koljcevic filed a timely motion for reconsideration, asserting that her previous attorney's ineffective assistance of counsel prejudiced her by depriving her of her right to appeal the denial of her asylum application. The BIA denied this motion on February 24, 2004, finding that although she complied with the procedural requirements for making an ineffective assistance of counsel claim, an attorney's failure to timely file a notice of appeal is not per se

ineffective assistance of counsel and she was not prejudiced by the attorney's mistakes. App. C.

Ms. Koljcevic filed timely petitions for review from both BIA decisions and the Sixth Circuit consolidated the petitions.

(iv) Statement of Facts

Ms. Zake Koljcevic is a 30-year-old native and citizen of Serbia and Montenegro. She is an ethnic Albanian. In early 1998, Ms. Koljcevic spent two or three months at her uncle's house in Montenegro because Serbian soldiers established a base near her mother's house. She was scared to leave her mother's house because of the war and Serbian treatment of Albanians, especially young women.

On April 28, 1998, her aunt died in Serbian artillery attack. That same night, Serbians broke into her family's house and took all of their possessions. The next day, Ms. Koljcevic and her family claimed her aunt's body and made preparations for the funeral service, which was held on April 30.

On the night of April 30, Serbian soldiers broke into her house and raped her sister, in front of Ms. Koljcevic and her family. The soldiers beat her father when he tried to stop them. They were forced to listen to her sister's screams.

Since then, her sister has not left the house and remains in shock.

The next month, Serbian soldiers stopped Ms. Koljcevic and her mother at a checkpoint. One of the soldiers shot at Ms. Koljcevic, narrowly missing her. Fortunately, another soldier intervened and allowed them to pass without further harm.

In June 1998, after Ms. Koljcevic returned home from her uncle's house, Serbian soldiers attacked her and her family at their home. Several soldiers began undressing her; she fainted and does not remember what happened next. Her family took her to a doctor, who told her that she suffered from depression because of the war and seeing her sister raped. Her mother would not tell her what happened and just cried whenever the subject was mentioned. Ms. Koljcevic had injuries all over her body from this assault.

In August 2000, a group of Serbs kidnapped her to sell her into prostitution. They captured her when her taxi stopped to help some men whose car appeared to have broken down in the mountains. It was a trap and several Serbians took her from the cab. They threw her in their car, tied her hands behind her back, and began touching and examining her. Fortunately, the car became stuck in the mud. The men

told Ms. Koljcevic to get out of the car to push. She used this opportunity to escape into the forest.

Before the INS released Ms. Koljcevic from custody, she hired Terence Hoerman to represent her in Immigration Court. After the IJ ordered her removed, she hired Mr. Hoerman to file her notice of appeal with the BIA. The IJ notified Mr. Hoerman that the notice of appeal was due on or before September 18, 2002. Mr. Hoerman did not file the notice until September 19, 2002.

(v) Statement of Court of Appeals and Supreme Court Jurisdiction

Jurisdiction in the Sixth Circuit Court of Appeals was proper. 8 U.S.C. § 1252(a)(2)(B). Venue was proper in the Sixth Circuit because an IJ sitting in Detroit, Michigan completed the Immigration Court proceedings. 8 U.S.C. § 1252(b)(2).

Petitioner invokes the jurisdiction of this Court on application for writ of certiorari under Supreme Court Rule 10(a), in that the Sixth Circuit has entered a decision in conflict with decisions of other United States courts of appeal on the same important matter and has sanctioned a decision of the BIA that has so far departed from the accepted and

usual course of proceedings, as to call for an exercise of this Court's supervisory power.

REASONS FOR GRANTING THE WRIT

I. Petitioner was Prejudiced Because her Previous Attorney's Ineffective Assistance Deprived her of an Opportunity to be Heard on her Asylum Application

As an asylum applicant, Ms. Koljcevic was entitled to BIA review of the IJ's denial of her asylum and withholding of removal applications. Mr. Hoerman's ineffective assistance of counsel deprived her of this review. His inexcusable failure to timely file her notice of appeal, resulting in the summary dismissal of her appeal, unquestionably prejudiced he in that it resulted in her being ordered removed without any consideration of the merits of her appeal.

A. Petitioner Complied with the Statutory Requirements for Making an Ineffective Assistance of Counsel Claim

The BIA acknowledged that Ms. Koljcevic complied with the procedural requirements for making an ineffective assistance of counsel claim. App. C; Matter of Lozada, 19 I.

& N. Dec. 637, 639 (BIA 1988). She submitted an affidavit setting forth her agreement with Mr. Hoerman and his errors. She filed a Request for Investigation with the State Bar of Michigan against Mr. Hoerman. Finally, she notified Mr. Hoerman of the charges against him and provided him with an opportunity to respond.

B. Petitioner Received Ineffective Assistance of Counsel

Mr. Hoerman's failure to timely file Ms. Koljcevic's notice of appeal, resulting in the summary dismissal of her appeal, undoubtedly falls below the minimum level of performance expected of attorneys in immigration proceedings. Filing an untimely notice of appeal is "frivolous" behavior that can subject an attorney to discipline by the BIA. 8 C.F.R. §§ 1003.1(d)(2)(i)(G), (iii).

Ms. Koljcevic reasonably expected, and deserved, more from Mr. Hoerman. The Michigan Rules of Professional Conduct require a lawyer to "act with reasonable diligence and promptness in representing a client." MRPC 1.3 (emphasis in original). "A lawyer shall provide competent representation to a client." MRPC 1.1.

C. Petitioner has a Due Process Right to Effective Assistance of Counsel

Aliens present in the United States, even those "whose presence ... is unlawful, involuntary, or transitory," are protected by the Fifth Amendment due process clause. Mathews v. Diaz, 426 U.S. 67, 77, 96 S. Ct. 1883, 48 L. Ed. 2d 478 (1976). The BIA and at least seven federal circuits have recognized "that despite having no right to appointed counsel in an immigration hearing, a respondent has a Fifth Amendment due process right to a fair immigration hearing and may be denied that right if counsel prevents respondent from meaningfully presenting his or her case." Matter of Assaad, 23 I. & N. Dec. 553, 558 (BIA 2003); see also Dakane v. Attorney General, 371 F.3d 771, 774-75 (11th Cir. 2004); Singh v. Ashcroft, 367 F.3d 1182, 1186 (9th Cir. 2004); Betouche v. Ashcroft, 357 F.3d 147, 149 (1st Cir. 2004); Denko v. INS, 351 F.3d 717, 723-24 (6th Cir. 2003); Uspango v. Ashcroft, 289 F.3d 226, 231 (3rd Cir. 2002); Iavorski v. INS, 232 F.3d 124, 128-29 (2nd Cir. 2000); Michelson v. INS, 897 F.2d 465, 468 (10th Cir. 1990).

Although immigration proceedings are civil in nature, the penalty is more severe than in most criminal cases, with the end result for a losing asylum applicant being banishment

from the United States and return to the country of persecution. Ineffective assistance of counsel deprives asylum applicants of the very procedural safeguards intended to protect bona fide refugees from future persecution. An asylum hearing should involve a "cooperative," not adversarial, approach. Matter of S-M-J-, 21 I. & N. Dec. 722, 724 (BIA 1997). American and international asylum law imposes upon the BIA a duty "to assist in clarifying and bringing out evidence in support of an asylum seeker's claim." Qiu v. Ashcroft, 329 F.3d 140, 156 n.17 (2nd Cir. 2003) *quoting* Matter of A-S, 21 I. & N. Dec. 1106, 1127 (BIA 1998); see also Shoafera v. INS, 228 F.3d 1070, 1075 (9th Cir. 2000).

The Fifth Amendment due process protection against ineffective assistance of counsel ensures that an asylum applicant receives a full and fair adjudication of her claim. "Asylum seekers should not bear the entire burden of adjudicative inadequacy at the administrative level." Guchshenkov v. Ashcroft, 366 F.3d 554, 560 (7th Cir. 2004) (criticizing repeated failure to deliver "reasoned judgments at the administrative level"). The BIA has time and again demonstrated its inability to exercise its statutory and

regulatory authority to clarify and bring out the evidence in support of a claim for asylum.

The Seventh Circuit noted that in the one-year period ending September 23, 2005, it reversed, in whole or in part, 40 percent of the BIA decisions it reviewed on the merits, as compared to 18 percent in other civil cases in which the United States was the appellee. Benslimane v. Gonzales, __ F.3d __, 2005 WL 3193641, *1 (7th Cir. 2005). The court frequently subjects the BIA and IJs to "severe" criticism because the "adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice." Id. Asylum applicants need effective assistance of counsel to help them present their claim and respond to any administrative errors.

D. The Ineffective Assistance of Counsel Prejudiced Petitioner by Depriving her of Review of her Asylum Claim

In deciding that there is no prejudice here to Petitioner, the executive agency misinterpreted it role. The BIA has to duty to "ensure that refugee protection is provided where such protection is warranted by the circumstances of an asylum applicant's claim." S-M-J-, 21 I. & N. Dec. at 723.

The BIA's refusal to consider Ms. Koljcevic's appeal, solely because of Mr. Hoerman's ineffective assistance of counsel, has deprived her of the protections afforded asylum applicants.

The right to appeal is not a hollow right. The Seventh Circuit reversed, in whole or in part, 40 percent of the petitions for review it received challenging the BIA decisions it reviewed on the merits. Benslimane, *supra*, 2005 WL 3193641 at *1. The "adjudication of [immigration] cases at the administrative level has fallen below the minimum standards of legal justice." Id. The BIA has the authority to hear late appeals or reopen cases sua sponte in the interests of justice. 8 C.F.R. §§ 1003.1(c), 1003.2(a).

Asylum applicants have the "constitutionally protected right to petition our government for political asylum." Haitian Refugee Center v. Smith, 676 F.2d 1023, 1038 (5th Cir. 1982). The INA and the United States' obligations under international law evince "a clear intent to grants aliens the right to submit and the opportunity to substantiate their claim for asylum." Id.; see also Augustin v. Sava, 735 F.2d 32, 37 (2d Cir. 1984).

Any alien physically present in the United States, regardless of status, is entitled to apply for asylum. 8 U.S.C.

§ 1158(a)(1). Aliens are entitled to a hearing on their asylum applications and have a right to appellate review. 8 C.F.R. §§ 1208.30(f), 1003.6(a). Asylum applicants are not "unlawfully present" unless they work without authorization. 8 U.S.C. § 1182(a)(9)(B)(iii)(II). Although Congress sought to greatly circumscribe the ability of the federal courts to review other discretionary decisions, Congress specifically protected the ability of the federal courts to review asylum determinations, including discretionary denials. 8 U.S.C. §§ 1252(a)(2)(B)(ii), (b)(4)(D). Furthermore, unlike asylum, the related relief of withholding of removal is mandatory. 8 U.S.C. § 1231(b)(3)(A).

In enacting the Refugee Act of 1980, "one of Congress' primary purposes was to bring United States refugee law into conformance with the 1967 United Nations Protocol Relating to the Status of Refugees." INS v. Cardoza-Fonseca, 107 S. Ct. 1207, 480 U.S. 421, 427, 94 L. Ed. 2d 434 (1987). All human beings "shall enjoy fundamental rights and freedoms without discrimination." 1951 Convention Relating to the Status of Refugees, preamble. Among these fundamental rights is "the right to seek and to enjoy in other countries asylum from

persecution." Universal Declaration of Human Rights, art. 14.

Although the right to apply for asylum is a "fragile" right, "the right to petition is nevertheless a valuable one to its possessor. By it he may at least send his message and be assured of the ear of the recipient." Haitian Refugee Center, 676 F.2d at 1039 (internal footnotes and citations omitted). The BIA turned a deaf ear to Ms. Koljcevic's plea, not because of the merits of her case, but because her attorney filed her appeal one day late. The DHS did not care about the timeliness of her appeal; it briefed the merits of her case and never raised the timeliness of her appeal.

Had Ms. Koljcevic received adequate representation, she could have established that she suffered past persecution. She witnessed her sister being raped, and was herself sexually assaulted, shot at, and kidnapped because of her Albanian ethnicity in a region torn by ethnic genocide. Having suffered past persecution, Ms. Koljcevic was entitled to a rebuttable presumption that she has a well-founded fear of future persecution. 8 C.F.R. § 1208.13(b)(1). Even if the DHS rebutted this presumption, she would have remained eligible for humanitarian asylum based on the either the severity of the past persecution or the "other serious harm"

she faces in Serbia and Montenegro. 8 C.F.R. § 1208.13(b)(1)(iii). The BIA should have considered whether she continues to have a well-founded fear of persecution, is entitled to humanitarian asylum, or is entitled to withholding of removal.

II. The Court Should Resolve a Split Among the Circuit Courts of Appeal Concerning the Prejudice to an Alien when her Attorney's Ineffective Assistance Results in the Summary Dismissal of her Appeal

The Sixth Circuit concluded that Ms. Koljcevic was not prejudiced by Mr. Hoerman's failure to timely file her notice of appeal, even though it resulted in the summary dismissal of her appeal. Several other courts presented with this issue, or the related situation where an attorney's failure to file a brief on appeal resulted in summary dismissal, have reach the opposite conclusion.

An alien is prejudiced "when the performance of counsel is so inadequate that it may have affected the outcome of the proceedings." Dakane, 371 F.3d at 775. "Where counsel fails to file any appeals brief in the context

of an immigration proceeding, effectively depriving an alien of an appellate proceeding entirely, there is a rebuttable presumption of prejudice." Id.

In Singh, the BIA dismissed an alien's appeal solely because his attorney failed to file a brief. 367 F.3d at 1186-87. Because the BIA summarily dismissed the appeal on that basis, and not on the merits of the appeal, "counsel's failure to file a timely brief deprived Singh of any meaningful review of the IJ's decision. A presumption of prejudice is thus warranted here." Id. at 1189. The alien did not have to show that he would have won had he filed a brief. Id. This is too high a burden for an alien to meet. Rather, the government has not rebutted the presumption of prejudice "if the alien is able to show 'plausible grounds for relief.'" Id. (internal citations omitted). The alien only had to show "that the BIA could *plausibly* have determined" he was eligible for asylum. Id.

Mr. Hoerman's error carries with it a presumption of prejudice because "the adversary process itself" has been rendered "presumptively unreliable." Roe v. Flores-Ortega, 528 U.S. 470, 120 S. Ct. 1029, 1038, 145 L. Ed. 2d 985 (2000) (internal citations omitted).

CONCLUSION

Petitioner respectfully submits that the Sixth Circuit erred in the following respects:

- Petitioner was prejudiced by her attorney's failure to timely file her notice of appeal.

Therefore, Petitioner respectfully prays that the Court grant his petition for writ of certiorari, reverse the decisions of the Sixth Circuit Court of Appeals and the BIA, and reopen the removal proceedings instituted against her.

Respectfully Submitted,

Marshal E. Hyman
Counsel of Record
Russell Reid Abrutyn

APPENDIX

6TH CIRCUIT FILINGS:

Order Denying Petition for Rehearing
and Petition for Rehearing En Banc,
filed 10/12/05 ..... A1 - A2

Memorandum Opinion on
Petition for Review of an Order of
the Board of Immigration Appeals,
filed 05/18/05 ..... B1- B2

BOARD OF IMMIGRATION APPEAL:

Decision of the Board of
Immigration Appeals,
filed 02/24/04 ..... C1 - C4

Decision of the Board of
Immigration Appeals,
filed 10/24/03 ..... D1 - D2

Oral Decision and Orders of
the Immigration Judge,
filed 08/19/02 ..... E1 - E14

APPENDIX A

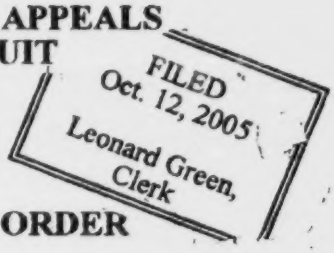
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER, DENYING PETITION FOR REHEARING
AND PETITION FOR REHEARING EN BANC,
FILED OCTOBER 12, 2005

A-1 through A-2

Nos. 03-4507/04-3292

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



ZAKE KOLJCEVIC, ***Petitioner,***	)	
	)	**ORDER**
v.	)	
ALBERTO R. GONZALES ***Respondent.***	)	

BEFORE: **NORRIS and BATCHELDER,** Circuit Judges; and MILLS,* District Judge

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition

*Hon. Richard Mills, Senior United States District Judge for the Central District of Illinois, sitting by designation.

were fully considered upon the original submission and decision of the cases. Accordingly, the petition is **denied**.

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Leonard Green, Clerk

APPENDIX B

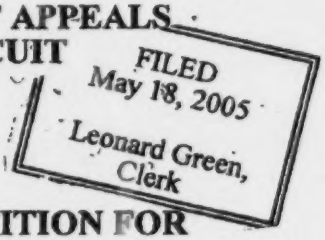
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MEMORANDUM OPINION ON
PETITION FOR REVIEW OF AN ORDER
OF THE BOARD OF IMMIGRATION APPEALS
FILED MAY 18, 2005

B-1 through B-2

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Nos. 03-4507 & 04-3292

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT



ZAKE KOLJCEVIC, *Petitioner-Appellant,*	)
	) **ON PETITION FOR**
v.	) **REVIEW OF AN**
ALBERTO GONZALES,	) **ORDER OF THE**
ATTORNEY GENERAL	) **BOARD OF**
THE UNITED STATES,	) **IMMIGRATION**
Respondent-Appellee,	) **APPEALS**

MEMORANDUM OPINION

Before: **NORRIS** and **BATCHELDER**, Circuit Judges, and **MILLS**, District Judge.*

PER CURIAM. Petitioner Zake Koljcevic appeals the Board of Immigration Appeal's (the "BIA") decision to deny her appeal for relief under the Convention Against Torture.

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*The Honorable Richard Mills, United States District Judge for the Central District of Illinois, sitting by designation.

Upon consideration of the record, the parties' briefs, and the relevant law, we are not persuaded that the BIA erred in dismissing Ms. Kljcevic's motion to reopen her petition. The BIA correctly found that Ms. Koljcevic's motion was untimely and that she failed to show prejudice. Thus, a detailed written opinion by this court would serve no useful purpose.

The BIA's decision is **AFFIRMED.**

APPENDIX C

BOARD OF IMMIGRATIONS APPEALS

DECISION OF THE BOARD OF IMMIGRATION APPEALS FILED FEBRUARY 24, 2004

C-1 through C-4

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the Board
of Immigration
Appeals

Falls Church, Virginia 22041

File: A78-558-024 - DETROIT Date: Feb. 24, 2004

In re: KOLJCEVIC, ZAKE

IN ASYLUM PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT:
Marshal Hyman, Esquire

ON BEHALF OF DHS:
Kathleen Alcorn, Assistant District Counsel

APPLICATION: Reopening

ORDER:

PER CURIAM: We have jurisdiction over this timely motion to reopen pursuant to 8 C.F.R. § 1003.2. The respondent argued therein that she was the victim of ineffective assistance of counsel when her former counsel neglected to file her appeal timely. The Board dismissed the respondent's appeal on October 24, 2003 for not filing it by the deadline. The respondent argued in her motion to reopen that her former attorney's negligence caused her prejudice, and she requested that her appeal be reinstated and

adjudicated. The motion has been deemed timely, but is denied.

A claim of ineffective assistance of counsel must satisfy the requirements set forth in our decision in *Matter of Lozada*, 19 I&N Dec. 637 (BIA), aff'd, 857 F.2d 10 (lst Cir.1988). In *Lozada*, we held that such motions require: (1) that the motion be supported by an affidavit of the allegedly aggrieved respondent setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel did or did not make to the respondent in this regard; (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him and be given an opportunity to respond; and (3) that the motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Id.* at 639.

The respondent has satisfied in her motion the procedural requirements set forth in Lozada, supra. The Board, however, has held that satisfying the above procedural requirements is in and of itself an insufficient reason to reopen. and that an attorney's failure to file an appeal on behalf of an alien is not per se ineffective assistance of counsel. *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003). It is also required that the claimant establish that he suffered prejudice as a result of his attorney's ineffectiveness. *Id.* The term "prejudice," refers to actual prejudice. *Id.* This means

that it is likely that an alien would have prevailed on appeal had the negligent representation not occurred. *Id.*

In the instant case, the respondent received a fair and complete hearing before the Immigration Judge. She was well represented by counsel throughout the hearing before the Immigration Judge and was provided every opportunity to present her claim for asylum and withholding of removal under sections 208 and 241(b)(3) of the Immigration and Nationality Act, 8 US.C. §§ 1158 and 1231(b)(3), and relief under Article 3 of the United Nations Convention Against Torture ("Convention").[1] At the hearing, the Immigration Judge determined that the respondent had not applied for asylum within a year of her arrival in the United States, and failed to establish that her failure to do so was excusable. Nothing presented within the respondent's motion to reopen or attachments convinces us that the respondent would likely have prevailed on appeal of that determination.

The remaining question is whether the respondent would likely have prevailed on appeal on the issue of whether she was entitled to withholding of removal. We do not dispute that the respondent may have had legitimate fears while she

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[1]United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature February 4, 1985, G.A. Res. 39/46. 39 U.N. GAOR Supp. No. 51 at 197, U.N. Doc. A/RES/39/708 (1984), *reprinted in 23* I.L.M. 1027 (1984), *modified in* 24 LL.M. 535 (1985).

lived in the former Yugoslavia. However, the immigration Judge concluded that despite the respondent's experiences, she would not more likely than not be persecuted in the future. We cannot fmd based upon the information submitted that her appeal would likely have been sustained by the Board. We further note that both the respondent's Notice of Appeal and brief were very sketchy, and provided very little argument in support of her contention that she was entitled to withholding of removal. Consequently, we cannot reopen these proceedings. *Matter of Assaad, supra*. The motion is denied.

/s/ Pauley Roger
FOR THE BOARD

APPENDIX D

BOARD OF IMMIGRATION APPEALS

DECISION OF THE BOARD OF IMMIGRATION APPEALS FILED OCTOBER 24, 2003

D-1 through D-2

U.S. Department of Justice
Executive Office for
Immigration Review

Decision of the Board
of Immigration
Appeals

Falls Church, Virginia 22041

File: A78-558-024 - DETROIT

Date: Oct. 24, 2003

In re: KOLJCEVIC, ZAKE

IN ASYLUM PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Hoerman, Terence G., Esq.

ORDER:

PER CURIAM. The appeal is untimely. A Notice of Appeal (Form EOIR-26) must be filed within 30 calendar days of an Immigration Judge's oral decision or the mailing of a written decision unless the last day falls on a weekend or legal holiday, in which case the appeal must be received no later than the next working day. See 8 C.F.R. §§ 1003.38(b), (c). In the instant case, the Immigration Judge's decision was rendered orally on August 19, 2002. The appeal was accordingly due on or before September 18, 2002. The record reflects, however, that the Notice of Appeal was filed with the Board of Immigration Appeals on September 19, 2002. We find that the appeal is untimely. The Immigration Judge's decision is accordingly now final, mid the record is returned

to the Immigration Court without further action. See 8 C.F.R. §§ 1003.3(a), 1003.38, 1003.39, 1240.14, and 1240.15.

We note that because we have dismissed the appeal for lack of jurisdiction, either party wishing to file a motion in this case should follow the following guidelines: If you wish to file a motion to reconsider challenging the finding that the appeal was untimely, you must file your motion with the Board. However, if you are challenging any other finding or seek to reopen your case, you must file your motion with the Immigration Court. *See Matter ofMladineo*,14 I&N Dec. 591 (BIA 1974); *Matter of Lopez*, 22 I&N Dec. 16 (BIA 1998). You should also keep in mind that there are strict time and number limits on motions to reconsider and motions to reopen. *See* 8 C.F.R. §§ lO03.2(c)(2), 1003.23(b)(1); *Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997).

/s/ Edward R. Grant

FOR THE BOARD

APPENDIX E

BOARD OF IMMIGRATION APPEALS

ORAL DECISION AND ORDERS OF THE IMMIGRATION JUDGE, FILED AUGUST 19, 2002

E-1 through E-14

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Detroit, Michigan

File A 78 558 024 August 19, 2002

In the Matter of

	)	
ZAKE KOLJCEVIC,	)	IN ASYLUM ONLY
Respondent	)	PROCEEDINGS

CHARGE:

APPLICATION:

ON BEHALF OF RESPONDENT:

Terrence G. Hoerman, Esquire
2000 Mount Elliott, Suite 100
Detroit, Michigan 48207

ON BEHALF OF SERVICE:
Linda Acorn, Esquire
Assistant District Counsel
Detroit, Michigan

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent in the instant case came as a visa waiver applicant and was subsequently paroled by the Immigration Service pursuant to 8 C.F.R. 208.2(b). The only authority this Court has is to decide asylum, withholding, and relief under the Convention Against Torture. The respondent was the only witness in the case and background information was submitted.

The first issue is as to whether or not respondent can apply for asylum pursuant to Section 208 of the Immigration and Nationality Act. Section 208(b) says subject to paragraph (d). Pursuant to Section 208 (b) one may not apply for asylum unless the alien demonstrates by clear and convincing evidence the application has been filed within one year of the date of alien's arrival in the United States, subject to paragraph (d), (d) says an application for asylum may be considered not withstanding paragraph (b) if the alien demonstrates to the satisfaction of the Attorney General if the existence of a changed circumstance materially affects the applicant's eligibility for asylum, or extraordinary circumstances relating to the delay in filing the application when the period specified in the subsection.

In the instant case the respondent has not alleged extraordinary circumstances, but has alleged that conditions have changed in her country of Montenegro after her arrival in the United States. It should be noted that the respondent came as a visa waiver applicant. Respondent was served and her signature is on the document. Her arrival is November 4th. She was served with this on 12/15/2000, a month after her arrival. And on this document is checked the box and she signed this form saying that the above alien arrived in the United States in the manner described below and has requested asylum. It's clear that from the time she arrived she intended to apply for asylum. That was her goal. The Service paroled her out despite the fact she gave a sworn statement at the airport on her arrival that nothing would have happened to her. The Service gave her a parole anyway and allowed her to apply for asylum. She didn't apply for asylum until after she was before an Immigration Judge. So, the respondent has a hard burden there to show the reason she didn't apply for asylum prior was because of changed circumstances.

The Court will note as noted by the Immigration Service that the Country Reports in 2000 and 2001 are very similar. There doesn't seem to be any major changes that

have taken place. Counsel alleges that the documents show there has been in increase in problems, and there may be a slight increase, but be that as it may, this respondent is arguing that she was persecuted personally back in 1998 and 2000. She came here and never applied for asylum. This Court believes that this of the kind of cases that the Congress is looking to change. Now counsel notes that one senator didn't like that and that's fine. I mean we're a country of laws in which the majority rules. The one senator didn't think that Congress should put this bar in there, but Congress did put this bar in there. I think the exception was put in there for where conditions really changed. You didn't have a fear of persecution when you got here, and conditions changed and gave you a fear of persecution. She's not alleging that. She hasn't even alleged, and counsel hasn't even alleged that she didn't have a fear of persecution when she came here. In fact his whole argument was that she was persecuted, past persecution in 1998 and 2000. So there would be no reason that she shouldn't have applied for asylum when she got here. And she knew about the asylum because she told the Immigration Service that she wanted asylum. In fact she was paroled to file an application. For whatever reason she chose

not to file until after she arrived in proceedings. The Court will find that she is subject to that bar.

The Court will note, however, that even if this were not the Court's finding, that the Court finds that while things have happened to this lady, and that conditions are not good in her country, that she has not met her burden showing that she was singled out for persecution as required by the law. And therefore I would not have granted asylum even if she were eligible. But I will explain that along the way. And I think the fact she didn't file lends credence to my finding that she did not have a really fear of persecution. She would have filed right away rather than waiting until the Immigration Service placed her and it was clear to her that she might be sent back, before she applied for the relief.

Respondent filed an asylum application, that's Exhibit No.2. and in this application she says that she fears persecution because of what happened to her family. She says her aunt was killed in a bombing. Her sister was raped in front of her by Serb militants. My mother and I were, she says her mother and she they tried to kill them because they left the house and went to a cousin's house, and that all these things happened to her. And she says that in August of 2002

somebody tried to kidnap her for sale and that she knows it was the Serbs, and they did this because of her ethnic background.

Now the respondent testified basically similar to her original application except there were some inconsistencies. She testified her nationality is Albanian although she's really from Montenegro. She never filed an application for asylum anywhere else in the world because she had relatives in the United States. She started talking about an August 2000 incident where people picked her up. She knew they were Serbian because she recognized one of the guys by face because she'd seen him in the city. She was taking a cab into the mountain when the cab broke down. She says this may have been a misinterpretation because she said the cab didn't break down, that they faked the car breaking down. In her application she says on the way there two people stopped the taxi. They told both the taxi driver and me to get out of the car. One of them shake my hand and introduced himself as Zulock. When he was shaking my hand, he grabbed and bit my ear which she didn't say originally. The taxi driver ran away while I was taken force by car. That statement doesn't indicate whether the cab broke down or not. And whether the

cabbie ran away by running away on foot or running away in a vehicle. Her testimony now is the cab didn't break down. And I think that's a very minor inconsistency that is easily explained. But then she testifies that these people tied her up, but then their car broke down. They touched her to see if she was good enough to be sold as a prostitute. And then the car got stuck in the rain. She knew the area very well so they got out to push the car. They were afraid of being wet so they let her push the car and she ran away. If they were so interested in taking her, I can't see why they would just let her be outside the car when they were inside the car. Be that as it may, she came home and her parents told her that she had to leave. And nothing happened to her mother, her father, and her sister. Nobody else left, only she left. And nothing happened to them after she left her country.

With regard to these other incidents on her asylum application she says that her aunt died during a raid. It looks like it was the same house, but now she says that it was two hours away. She indicates that even though it's two hours away, she was such high up in the mountains that she could look down and see and had a feeling that it was her aunt's house. I don't think that that's that relevant, but her aunt's

house was far away, and her aunt's killing was obviously part of a war. And civil war is a very bad thing, and people got killed during a war. But the Congress has decided that's not asylum.

She says her sister was raped in front of her by Serb militants. There was some conflict as to the date. She was a little confused as to when things happened. She added a few things into this anyway. There was no mention in her asylum application of an incident on April 28th, the same day her aunt was killed, when the house was robbed. In fact on her application respondent says on April 28th the same day my aunt died, Serbs came to the house trying to provoke us. They were yelling and saying this is not your home you do not belong. They terrorized and threatened to kill us. Most of the women and young villagers left because their life was in danger. As one of the Serbs they told us to go to Albania and leave Montenegro. I left the house and went to my uncle's house where I stayed for three months. When I returned, they came again and forced us to evacuate the house and made us lie in the basement. We put there one of them approached me and tore my clothes. He tried to rape me.

Today she says that the rape occurred two days after the original thing before she went into hiding in her uncle's house for three months. I think this is very important to her credibility issue. And it's clear from the country reports that things are happening in Albania and in Kosovo, and in Montenegro that are not good. However, as noted by the Service, if anything, conditions seem to be getting better in Montenegro where they are trying to work things out, and where people from the Albanian background are in the government of Montenegro.

In order to qualify for asylum one must show that they were persecuted by the government or a group the government' unwilling or unable to protect one from. It has to be based on one of the five categories. Now obviously she is referring to her nationality as an Albanian heritage in a country which she's saying is dominated by the Serbs. However, the state Department indicates that there are Albanians within the government. The burden of proof is on the respondent. The respondent must show that she meets the definition as are set out in the laws. Her testimony alone might be sufficient if clear, concise, detailed, and believable. Matter of Mogharrabbi, 19 I&N Dec. 495 (BIA 1987) .

In the instant case the Court cannot find that the testimony is clear, and concise, and detailed enough to show that she was persecuted by the government or by a group the government is unable to protect her from based on her ethnicity. The reports are clear that there were abuses in the past it appears where during the fighting that the Serbs when they were fighting over there, the Serbs were attacking people randomly. There was also the fact that they were raping people, and that's well known. The question is are they still doing this today, and the report seems to say that in that area where she was living that things have gotten better as noted by the Service. While the Court would note that things are not good in that country, it should also be noted that it's still her burden to prove by clear and convincing evidence that she would be persecuted.

Now there's no documentary evidence to back up her story and the Court has to give a fair amount of weight to her statement of when she arrived in the United States. And as the Court says, this in conjunction with the fact that she never applied for asylum. It says would you be harmed if you returned to your country? She says no. Are you willing to go back to your country? She says yes. She says she was scared.

Well, that's the last thing one would say if they're afraid to go back to their country. Because if one would say are you afraid to go back to your country and they say no, and would you go back to your country and they say yes, that would seem to a normal individual to me, well maybe I'll go back. And yet they didn't send her back. Instead they said well you can apply for asylum in the United states, and they paroled her in.

I think the fact that she didn't apply for asylum within the year does go to the fact that maybe she didn't have as strong a claim as she would want us to believe. Now counsel argues that she did file within like three to four months after that in March, which is only five months late. But I think it should be noted that this was not done until after she had been to Court.

In Court proceedings if she had filed her application before with the Service before she went to Court, the Court might have had a different view on whether or not she had missed the deadline. Because I would have said well maybe she did have a claim and maybe that's why she wanted it. It appears that this is the only relief available because if she didn't file for asylum on March 2nd, then the Court would have just issued an order removing her from the United States

because the Court cannot go into whether she's removable as Service has found she's removable. And the Court can't go behind that because only asylum or withholding so therefore she knew that she would be removed at that time.

Since the Court finds that she's not eligible for asylum, the Court will now address the issue of withholding. In order to qualify for withholding of removal one must show that their life or freedom would be threatened that can again be based on race, religion, nationality, membership in a particular social group, or political opinion. Since the Court finds that she has not established a well-founded fear of persecution by the government or a group the government's unwilling or unable to control, she has clearly not met the higher showing life or freedom would be threatened in her country on account of one of the five categories set down in the Act.

It should be noted here and I think I did, but I want to make it clear, that the Country Reports indicate that Montenegro there are Albanians in the government. And I don't think she's alleging the government is doing this. I think she's alleging there is certain people within the military who were at that time at least, when she was there, raping people

and doing harm to people. I think that things have changed for the better there, but even then the fact that a soldier had raped them, it doesn't mean it was by the government even though it may have been one or two government officials. The Courts have ruled that it must be by the government or by a group the government cannot protect her and that just because some people who happen to be members of the government do something wrong, does not measure persecution within the law.

In order to qualify for relief under the Convention Against Torture one must show they were tortured, or would be tortured by the government. Torture requires that it be with the acquiescence of the government and not by a third party. Unlike withholding it must be by the Government. The Board determined in Matter of S-V, in 3430 (BIA 2000) that the definition does not indicate harm occurred by someone other than the government even if the government is not able to protect them. 8 C.F.R. 208 specifically states that lesser forms of cruel and inhuman treatment do not amount to torture.

This lady unfortunately has suffered some and has seen a lot of family problems, but it is interesting to note for both asylum and withholding as well, that her family is still

there, including her sister who was raped, and nothing's ever happened to her. Now she says she just stays in the house, but Matter of A-E-M, states that where a family remains unharmed in a country that this diminishes the claim. And in this case it's significant because she's claiming basically a large part on the fact that her sister was raped. She was not raped. She said she collapsed and was not raped. Her sister was raped. She's relying on that. They attempted to kill her mother. She's relying on that. And yet they remain back there and nothing's happened to them in all this time. She has family in the United States and it appears she would like to come here. She's young and thinks it would be better here. And I understand that. And maybe our Congress should pass a law which says that we should take into being civil disruption, but the courts of law have ruled this is not a ground for asylum.

Accordingly, the following order must be entered.

IT IS ORDERED that respondent's request for asylum pursuant to 208, withholding pursuant to Section 241(b) (3) and relief under the Convention Against Torture be denied.

/s/ Kenneth S. Hurewitz
KENNETH S. HUREWITZ
Immigration Judge